# Tom Eastwind 365 Sdn Bhd v Pemunya-Pemunya Kapal Atau Vesel Icon Sophia

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO WA-27NCC-27–06 OF 2022
ONG CHEE KWAN J
4 OCTOBER 2024

*Tort — Negligence — Maritime negligence — Plaintiff claimed against defendant for damages caused during anchor deployment operation — Whether res ipsa loquitur was applicable — Whether court was bound to accept defendant's expert's conclusion — Whether plaintiff had established quantum of damages claimed*

The plaintiff was the owner of an accommodation work barge, Two Eastwind ('the barge'). The defendant, being the owners of the anchor handling tug supply ('AHTS') vessel, Icon Sophia ('the tug'), was engaged together with another AHTS, Two Kasturi, to take the eight anchors from the barge and lay them in pre-planned positions. Once these anchors were in position, the barge would variously tension the anchor wires until the barge was in the predetermined draught, position and heading ('the anchor deployment operation'). The anchor deployment operation was conducted under the guidance and instruction of a marine controller stationed at the barge and in the employ of the plaintiff. The anchors were to be deployed in the following sequence or pattern: S1, P1, P4, S4, P3, S3, P2 and S2 ('the anchor pattern'). However, the anchor pattern was changed on the first day of the anchor deployment operation and due to a passing squall encountered, the anchor S4 was deployed at a temporary position before it was subsequently laid at its correct designated position. On the second day of the anchor deployment operation, there was another change to the anchor pattern resulting in anchor P2 to be the final anchor to be deployed instead of anchor S2 and the tug was instructed to approach the barge to pick up the P2 anchor socket. The said anchor deployment required the tug to come in close to the barge to 'snatch' the anchor before the tug could pull away to deploy the said anchor at its pre-determined location. However, due to the prevailing current of 1.5 knots to 2.0 knots, the tug found that it was not possible to do a perpendicular approach to snatch the anchor socket. Instead, the bow of the tug was swung to the port side to allow the propellers to compensate for the current. The operation of retrieving the P2 anchor socket from the barge took approximately 25 minutes and during this time, the bow of the tug continued to swing to port which resulted in the tug eventually coming alongside the barge. After the P2 anchor socket was connected to the anchor wire on board the tug, the combined manoeuvring restriction of the P2 anchor wire over the

stern of the tug together with 2 knot current still pushing the tug against the barge resulted in difficulties for the tug to move away from the barge. The tug finally managed to pull away from the barge when maximum engines and bow thrusters' power were applied. However, in the process, as the tug's bow swung to the starboard, her aft port quarter came into contact with the barge's port bow side, resulting in damage and indentations to her shell plating ('the accident'). A note of protest was issued to the master of the tug ('DW3') by the master of the barge on the same day. Hence, this claim by the plaintiff. The plaintiff in mounting its claims against the defendant based on the tort of negligence had relied on the doctrine of *res ipsa loquitur* and claimed RM1,128,572.77 as damages. The issues for determination were: (a) whether *res ipsa loquitur* was applicable under the facts of this case; (b) whether the court was bound to accept the defendant's expert's conclusion; and (c) whether the plaintiff had established its quantum of damages as claimed.

**Held**:

(1) It the case of *Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the 'Borcos Takdir'* [2012] 5 MLJ 515, it was held that for the doctrine of *res ipsa loquitur* to be applicable on the factual matrix of a case, the court must be satisfied of three conditions: (a) the accident was such that it would not, in the ordinary course of things, have happened without negligence or if proper care had been taken ('first condition'); (b) the thing or instrumentality that inflicted the damage was under the sole management and control of the defendant, or of someone from whom he was responsible or whom he had a right to control ('second condition'); and (c) there must be no evidence as to why or how the accident took place ('negative condition'). DW3 on his own accord had made the decision to pull away from the barge. He alone had: (i) the sole control and possession of the tug and the manoeuvring process; and (ii) the exclusive knowledge of the conditions and the limitation factors that were at play when pulling away the tug from the barge at the time. The defendant rightly conceded that the first condition and the second condition of res ipsa loquitor were satisfied in this case. The fact that DW3 had testified on the accident and/or the fact that the defendant had procured DW1 as its expert to opine on the possible cause(s) of the accident, did not mean that the negative condition for the application of res ipsa loquitur was not satisfied because the instrumentality of the accident was solely within the control and management of the defendant that the defendant could procure testimonies to be given on the cause of the accident. The testimonies of DW1 and DW3 could not be taken as a negation of the negative condition but instead introduced by the defendant to support its case to negate or rebut the inference of negligence. Accordingly, all the three conditions for the application of *res ipsa loquitur* had been met by the

plaintiff (see paras 37, 64–65 & 73–74).

(2) It was not insignificant that DW3 had confirmed that prior to commencing the operation, there was a toolbox meeting to assess the conditions and the risks or hazards that the tug may encounter in the performance of the anchor deployment operation. There was no discussion recorded indicating any concerns raised about the change to the sequence of the anchor deployment or any related hazards or risks arising therefrom even when this was already made known to him. Neither was there any indication that the prevailing current of 1.5 to 2.0 knots were deemed as unsafe or risky to carry out the operation. Both the factors, namely, the change to the anchor pattern for the anchor deployment operation and the prevailing current condition were known to the defendant prior to the tug's commencement of the anchor deployment operation and before she proceeded to pick up the P2 anchor socket (see paras 86 & 88).

(3) The opinion of DW1 was not based on sound grounds or supported by facts. Thus, the court was not bound to accept his opinion even in the absence of any expert called by the defendant. The present case was not an accident that was inevitable at all. Not only did the defendant failed to the marine controller to put to him that the change to the anchor pattern with the prevailing known current condition at the time would lead to the inevitable accident, DW3 himself did not think so as well. The accident could have been avoided by DW3 simply refusing to commence the anchor deployment. Accordingly, the defendant had not established on the balance of probability that there was another probable cause for the accident which did not involve negligence on the part of the defendant and which was more probable than the inference of negligence established by the plaintiff based on the doctrine of *res ipsa loquitur* (see paras 97 & 99–100).

(4) It was clearly an error of judgment by DW3 when he attempted to manoeuvre the tug to pull away from the barge. It was incumbent upon him as the master of the tug to ensure that in his manoeuvre of the tug to pull away from the barge, he would not cause any damage to the barge which was effectively stationary. Instead, DW3 had allowed the tug to come too near alongside the barge. This had created the limitation and restrictions to her manoeuvrability to pull away from the barge. The situation was not a fortuity but a result of a lack of care or a failure to take necessary avoidance steps. Then there was the decision to proceed with the pulling away notwithstanding the awareness by DW3 that there was a high risk of a collision if the barge's heading could not be changed. DW3 knew of this risk since he had sought for the barge to change her heading. Accordingly, not only had the defendant failed to displace the inference of negligence in this case, based on the evidence that DW1 and

DW3 had adduced, it was also established that on the balance of probabilities, the cause of the accident was due to a breach of duty of care by DW3 (see paras 115–116 & 119).

(5) No evidence was led by the plaintiff to assist the court to assess what would be the actual repair costs that the plaintiff sustained arising from the damage that was caused to the barge arising from the accident. The documents placed before the court did not support the plaintiff's quantum of claims at all. However, although the plaintiff had failed to proof its claims for damages, the defendant vide their witnesses conceded that damage had been sustained by the barge resulting from the accident. Thus, the defendant was ordered to pay the plaintiff the sum of RM50,000 as damages (see paras 133–134 & 146–147).

(6) Prior to the commencement of the action, the defendant had made a Calderbank offer to settle to the plaintiff. The defendant had made multiple offers to settle on very generous terms but the plaintiff had spurned all those offers. The entire trial in this case could have been avoided if the plaintiff had accepted the defendant's Calderbank offer. Hence, costs in this case ought to be visited on the plaintiff notwithstanding that the plaintiff had succeeded on the question of liability. The plaintiff was also to reimburse the defendant the sum of SGD70,947.57 being the amount that the defendant had paid to engage DW1 as its expert witness for the trial (see paras 150, 154–156 & 159).

**[Bahasa Malaysia summary**

Plaintif adalah pemilik Barj Penginapan Kerja, Two Eastwind ('barj'). Defendan, yang merupakan pemilik kapal Pengangkutan Tunda Sauh ('AHTS'), Icon Sophia ('kapal tunda'), telah dilibatkan bersama dengan AHTS lain, Two Kasturi, untuk mengambil lapan anchor dari barj dan meletakkannya di posisi yang telah dirancang. Setelah sauh berada dalam kedudukan, barj akan menegangkan kabel sauh dengan pelbagai cara sehingga barj berada dalam drauf, kedudukan, dan arah yang telah ditetapkan ('operasi penempatan sauh'). Operasi penempatan sauh ini dijalankan di bawah panduan dan arahan pengawal laut yang bertugas di barj dan bekerja untuk plaintif. Sauh akan disusun mengikut urutan atau pola berikut: S1, P1, P4, S4, P3, S3, P2 dan S2 ('pola sauh'). Walau bagaimanapun, pola sauh ini diubah pada hari pertama operasi penempatan sauh dan disebabkan oleh ribut yang berlalu, sauh S4 dilepaskan di posisi sementara terlebih dahulu sebelum diletakkan di posisi yang betul. Pada hari kedua operasi, terdapat perubahan lagi dalam pola sauh yang menyebabkan sauh P2 menjadi sauh terakhir yang perlu dipasang, bukannya S2, dan kapal tunda diberi arahan untuk mendekati barj bagi mengambil soket sauh P2. Penempatan sauh ini memerlukan kapal tunda mendekati dekat ke barj untuk 'menangkap' sauh sebelum kapal tunda bergerak untuk menempatkannya di lokasi yang telah ditetapkan. Namun, disebabkan arus dari 1.5 knot hingga 2.0 knot, kapal tunda mendapati tidak

dapat melakukan pendekatan secara serenjang untuk menangkap soket sauh. Sebaliknya, haluan kapal tunda dipusing ke sisi pelabuhan bagi membolehkan kipas mengimbangi arus tersebut. Operasi mengambil soket sauh P2 dari barj mengambil masa sekitar 25 minit dan sepanjang masa itu, haluan kapal tunda terus berayun ke pelabuhan yang akhirnya menyebabkan kapal tunda menyusup ke sebelah barj. Setelah soket sauh P2 disambungkan ke kabel sauh di atas kapal tunda, sekatan pergerakan yang digabungkan oleh kabel sauh P2 dengan haluan kapal tunda bersama arus 2 knot yang masih menolak kapal tunda ke arah barj menyebabkan kesukaran untuk kapal tunda menjauhi barj. Akhirnya, kapal tunda berjaya menarik diri dari barj apabila kuasa maksimum enjin dan penujah haluan digunakan. Walau bagaimanapun, dalam proses itu, apabila haluan kapal tunda berayun ke kanan kapal, bahagian port belakangnya bersentuhan dengan bahagian depan sebelah port barj, yang menyebabkan kerosakan dan lekukan pada shell plating ('kemalangan'). Satu nota bantah dikeluarkan kepada kapten kapal tunda ('DW3') oleh kapten barj pada hari yang sama. Oleh itu, ini adalah tuntutan yang dikemukakan oleh plaintif. Dalam menuntut ganti rugi terhadap defendan berdasarkan tort kecuaian, plaintif bergantung kepada doktrin *res ipsa loquitur* dan menuntut RM1,128,572.77 sebagai ganti rugi. Isu-isu yang perlu dipertimbangkan ialah: (a) sama ada *res ipsa loquitur* boleh digunakan dalam fakta kes ini; (b) sama ada mahkamah perlu menerima kesimpulan pakar defendan; dan (c) sama ada plaintif telah membuktikan jumlah kerugiannya seperti yang dituntut.

**Diputuskan:**

(1) Dalam kes *Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the 'Borcos Takdir'* [2012] 5 MLJ 515, mahkamah memutuskan bahawa bagi doktrin *res ipsa loquitur* digunakan berdasarkan fakta kes, mahkamah mesti berpuas hati terhadap tiga syarat: (a) kemalangan tersebut adalah perkara yang tidak akan berlaku, dalam kebanyakan keadaan, tanpa kecuaian atau jika penjagaan yang sewajarnya telah diambil ('syarat pertama'); (b) perkara atau instrumen yang menyebabkan kerosakan berada di bawah kawalan dan pengurusan tunggal defendan, atau seseorang yang bertanggungjawab kepada defendan atau yang memiliki hak kawalannya ('syarat kedua'); (c) tiada keterangan tentang sebab atau bagaimana kemalangan itu berlaku ('syarat negatif'). DW3 secara sendiri telah membuat keputusan untuk menarik dari barj. Dia sendiri mempunyai: (i) kawalan dan pemilikan tunggal terhadap kapal tunda dan proses olah gerak; dan (ii) pengetahuan eksklusif mengenai keadaan dan faktor pembatasan yang berlaku ketika menarik kapal tunda dari barj pada masa itu. Defendan dengan tepat mengakui bahawa syarat pertama dan kedua res ipsa loquitur dipenuhi dalam kes ini. Hakikat bahawa DW3 memberi keterangan mengenai kemalangan dan/atau fakta bahawa defendan telah menampilkan DW1 sebagai pakarnya untuk mengulas kemungkinan

punca-punca kemalangan, tidak bermakna syarat negatif untuk penggunaan res ipsa loquitur tidak dipenuhi kerana instrumen kemalangan berada di bawah kawalan dan pengurusan defendan dan defendan boleh mendapatkan keterangan mengenai punca kemalangan tersebut. Keterangan DW1 dan DW3 tidak boleh dianggap sebagai penafian terhadap syarat negatif tetapi dianggap sebagai usaha defendan untuk menyokong kesnya dan menafikan atau membantah inferens kecuaian. Oleh itu, semua tiga syarat untuk penggunaan res ipsa loquitur telah dipenuhi oleh plaintif (lihat perenggan 37, 64–65 & 73–74).

(2) Adalah penting bahawa DW3 telah mengesahkan bahawa sebelum memulakan operasi, terdapat mesyuarat keselamatan untuk menilai keadaan serta risiko atau bahaya yang mungkin dihadapi kapal tunda dalam menjalankan operasi penempatan sauh. Tiada perbincangan direkodkan yang menunjukkan bahawa sebarang kebimbangan mengenai perubahan kepada urutan penempatan sauh atau bahaya atau risiko berkaitan yang timbul daripadanya, walaupun perkara ini sudah diberitahu kepadanya. Juga, tidak ada petunjuk bahawa arus yang berlaku dari 1.5 hingga 2.0 knot dianggap tidak selamat atau berisiko untuk menjalankan operasi tersebut. Kedua-dua faktor, iaitu perubahan kepada pola sauh untuk operasi penempatan sauh dan keadaan arus yang berlaku, diketahui defendan sebelum kapal tunda memulakan operasi dan sebelum dia mengambil soket sauh P2 (lihat perenggan 86 & 88).

(3) Pendapat DW1 tidak berasaskan alasan yang kukuh atau disokong oleh fakta. Oleh itu, mahkamah tidak terikat menerima pendapatnya walaupun tiada pakar lain dipanggil oleh defendan. Kes ini bukanlah satu kemalangan yang tidak dapat dielakkan langsung. Selain daripada kegagalan defendan untuk meminta pengawal laut memberi pandangan bahawa perubahan kepada pola sauh dengan keadaan arus yang diketahui pada masa itu akan menyebabkan kemalangan yang tidak dapat dielakkan, DW3 sendiri tidak berpendapat demikian. Kemalangan tersebut sebenarnya boleh dielakkan oleh DW3 sekiranya dia terus menolak untuk memulakan operasi pengedaran sauh tersebut. Oleh itu, defendan tidak berjaya membuktikan atas imbangan kebarangkalian bahawa punca kemalangan itu adalah sebab lain yang tidak melibatkan kecuaian dari pihak defendan dan yang lebih berkemungkinan berbanding inferens kecuaian yang dibuktikan oleh plaintif berdasarkan doktrin *res ipsa loquitur* (lihat perenggan 97 & 99–100).

(4) Ia jelas merupakan satu kesilapan penghakiman oleh DW3 apabila dia mencuba untuk memanipulasi kapal tunda menarik dari barj. Adalah tanggungjawabnya sebagai kapten kapal tunda memastikan bahawa dalam olah gerak kapal tunda menarik dari barj, dia tidak akan menyebabkan kerosakan kepada barj yang sedang statik. Sebaliknya, DW3 membenarkan kapal tunda mendekati terlalu dekat ke sebelah

barj. Ini telah mewujudkan kekangan dan had ke atas keupayaan olah gerak kapal tunda untuk menarik dari barj. Situasi ini bukanlah satu kejadian di luar kawalan, tetapi hasil daripada kecuaian atau kegagalan mengambil langkah pengelakan yang diperlukan. Selain itu, terdapat keputusan untuk meneruskan tindakan menarik walaupun DW3 sedar bahawa terdapat risiko tinggi berlakunya perlanggaran jika haluan barj tidak boleh diubah. DW3 mengetahui risiko ini kerana dia telah meminta supaya barj mengubah haluannya. Oleh itu, bukan sahaja defendan gagal untuk melepaskan inferens kecuaian berdasarkan keterangan yang dikemukakan oleh DW1 dan DW3, tetapi juga terbukti bahawa berdasarkan kebarangkalian, punca kemalangan adalah disebabkan pelanggaran kewajipan berjaga-jaga oleh DW3 (lihat perenggan 115–116 & 119).

(5) Tiada keterangan yang dikemukakan oleh plaintif untuk membantu mahkamah menilai kos pembaikan sebenar yang ditanggung oleh plaintif berikutan kerosakan yang berlaku kepada barj akibat kemalangan tersebut. Dokumen yang dikemukakan di hadapan mahkamah tidak menyokong jumlah tuntutan plaintif sama sekali. Walau bagaimanapun, walaupun plaintif gagal membuktikan tuntutannya, defendan melalui saksi-saksi mereka mengakui bahawa kerosakan telah berlaku kepada barj akibat kemalangan. Oleh itu, defendan diperintahkan membayar kepada plaintif sebanyak RM50,000 sebagai ganti rugi (lihat perenggan 133–134 & 146–147).

(6) Sebelum tindakan bermula, defendan telah membuat tawaran Calderbank untuk menyelesaikan perkara ini kepada plaintif. Defendan telah membuat beberapa tawaran penyelesaian dengan terma lumayan, tetapi plaintif menolak semua tawaran tersebut. Kes keseluruhan boleh dielakkan jika plaintif telah menerima tawaran Calderbank tersebut. Oleh itu, kos dalam kes ini patut dikenakan ke atas plaintif meskipun mereka berjaya dalam isu tanggungjawab. Selain itu, plaintif juga diperintahkan membayar balik kepada defendan sejumlah SGD70,947.57, iaitu jumlah yang dibayar defendan kepada DW1 sebagai saksi pakar untuk perbicaraan (lihat perenggan 150, 154–156 & 159).]

**Cases referred to**

*Byrne v Boadle* (1863) 159 ER 299; (1863) 2 H & C 722 (refd)
*Calderbank v Calderbank* [1975] 3 All ER 333, CA (refd)
*Donald Campbell & Co Ltd v Pollak* [1927] All ER Rep 1, HL (distd)
*Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 ; [2017] SGCA 65, CA (refd)
*KC Leong Holdings Sdn Bhd v Datin Moh Bee Ling* [2015] 7 MLJ 10; [2014] 1 LNS 741, HC (folld)
*Muhammed Shareef Mohamed Sagubar & 3 Ors v Malaysia Building Society*

*Berhad* [2024] MLJU 784 ; [2024] CLJU 724, HC (refd)
*Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the ' Borcos Takdir'* [2012] 5 MLJ 515, HC (refd)
*Saeng-Un Udom v PP* [2001] 3 SLR 1, CA (refd)
*Scott v The London and St Katherine Docks Company* (1865) 159 ER 665; (1865) 3 H & C 596 (refd)
*Syed Abu Bakar bin Ahmad v PP* [1984] 2 MLJ 19, FC (refd)
*Tenaga Nasional Bhd v Big Man Management Sdn Bhd* [2024] 2 MLJ 652; [2024 2 CLJ 775, CA (refd)
*The Schwan-The Albano* [1892] P 419, CA (refd)
*U Television Sdn Bhd & Anor v Comintel Sdn Bhd* [2017] 5 MLJ 292; [2017] 10 CLJ 580, FC (refd)

**Legislation referred to**

Rules of Court 2012 O 59 r 8

*Thayakugan (Emily Chong, Aiman Rahimi, Nithi Anandan and David Chew Koe Kar with him) (Othman Hashim & Co) for the plaintiff.*
*Aaron Siva (Jerrica Quah and David with him) (Sativale Mathew Arun) for the defendant.*

**Ong Chee Kwan J:**

INTRODUCTION

**[1]** The dispute in this case arose from an accident that had occurred during an anchor deployment operation that had taken place at the Dulang B Oilfield located approximately 170km northeast of Terengganu, Malaysia. The defendant's anchor handling tug supply (AHTS) vessel, Icon Sophia had contacted the port side hull of the plaintiff's stationary accommodation work barge (AWB), Tom Eastwind while manoeuvring to pull away after picking up the last anchor socket for the operation. This resulted in damages to the barge's shell plates.

**[2]** At the trial, the plaintiff relied on the doctrine of *res ipsa loquitur.* Once referred to as the 'illegitimate offspring from a chance remark', the doctrine, in simple terms, enables a plaintiff to establish an inference of negligence even when there is insufficient or no direct evidence to establish the cause of the accident in a situation where the accident would not have occurred in the ordinary course of things had proper care been exercised.

**[3]** Whilst it is easy to state what *res ipsa loquitur* means, it is at times difficult to come to grasp with its actual application and operation in a particular case.

**[4]** In this judgment, I have sought to clarify on the operation of *res ipsa loquitur* at the trial and the shifting of the evidential burden of proof between the parties. More specifically, the judgment deals with the 'negative condition' that must be satisfied for the application of the doctrine, namely, that there must be no evidence as to why or how the accident took place. The defendant had contended that this condition was not satisfied in this case.

**[5]** The judgment also examined the application of a Calderbank offer on the issue of costs.

## BACKGROUND FACTS

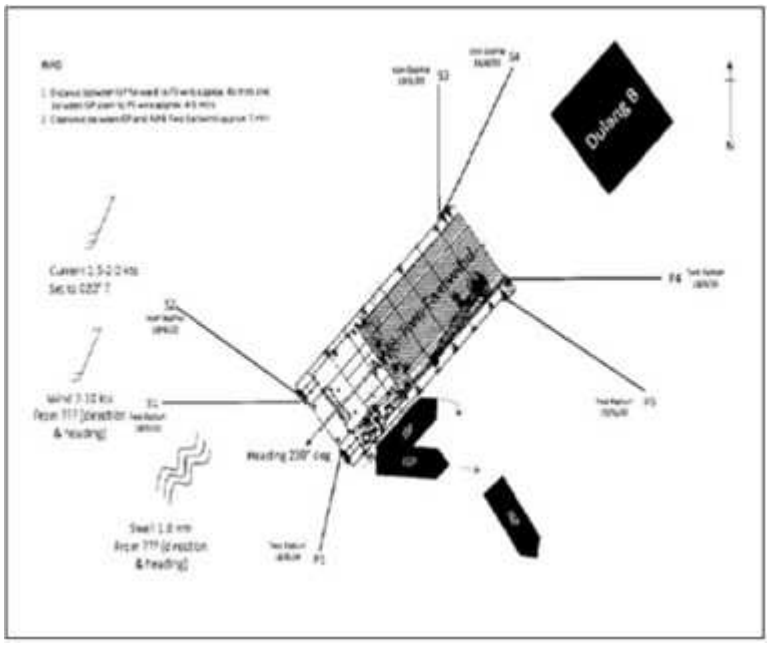
**[6]** The plaintiff was the owner of an accommodation work barge (AWB), Two Eastwind ('the barge').

**[7]** The barge had eight point mooring spread, utilising 8 x 10 tonne Flipper Delta anchors.

**[8]** The defendant, being the owners of the anchor handling tug supply (AHTS) vessel, Icon Sophia ('the tug') was engaged together with another AHTS, Two Kasturi to take the eight anchors from the barge and lay them in pre-planned positions. Once these anchors are in position, the barge would variously tension the anchors wires until the barge is in the predetermined draught, position and heading ('the anchor deployment operation').

**[9]** The anchors were designated P1 to P4 port side forward to aft and S1 to S4 starboard side forward to aft. The following diagram shows the positions of the barge's eight anchors in relation to the Oil Platform Dulang-8:

*(the remainder of this page is intentionally left blank)*




**[10]** The anchor deployment operation was conducted under the guidance and instruction of a marine controller stationed at the barge and in the employ of the plaintiff ('the marine controller').

**[11]** The anchor run or deployment procedure was laid out in a document dated 5 June 2020 ('the geomatic document'). According to the geomatic document, the anchors were to be deployed in the following sequence or pattern: S1, P1, P4, S4, P3, S3, P2 and S2 ('the anchor pattern').

**[12]** However, the anchor pattern was changed on the first day of the anchor deployment operation on 18 June 2020 and due to a passing squall encountered on that day, the anchor S4 was deployed at a temporary position before it was subsequently laid at its correct designated position. Apart from the aforesaid, nothing of significance happened that day.

**[13]** On the second day of the anchor deployment operation on 19 June 2020, there was another change to the anchor pattern resulting in the anchor P2 to be the final anchor to be deployed instead of the anchor S2 and the tug was instructed to approach the barge to pick up the P2 anchor socket.

**[14]** The said anchor deployment required the tug to come in close to the barge to 'snatch' the anchor before the tug could pull away to deploy the said anchor at its pre-determined location.

**[15]** However, due to the prevailing current of 1.5 knots to 2.0 knots at 020 degree (T), the tug found that it was not possible to do a perpendicular approach (this is where the vessel's twin propellers could maintain distances from the barge and the tug's bow thrusters maintaining the heading) to snatch the anchor socket. This was because the current would have acted on the tug's starboard beam and pushed her to the barge.

**[16]** Instead, the bow of the tug was swung to the port side to allow the propellers to compensate for the current. The operation of retrieving the P2 anchor socket from the barge took approximately 25 minutes. During this time, the bow of the tug had continued to swing to port which resulted in the tug eventually coming alongside the barge.

**[17]** After the P2 anchor socket was connected to the anchor wire on board the tug, the combined manoeuvring restriction of the P2 anchor wire over the stern of the tug together with the 2 knot current still pushing the tug against the barge resulted in difficulties for the tug to move away from the barge.

**[18]** Around 12:45pm, when applying maximum engines and bow thrusters' power, the tug finally managed to pull away from the barge. However, in the process, as the tug's bow swung to starboard, her aft port quarter came into contact with the barge's port bow side, resulting in damage and indentations to her shell plating ('the accident').

**[19]** The aforesaid manoeuvre had in fact resulted in one of the tug's tyre fenders becoming detached and lost to the sea. The pad eyes which had secured the tyre fender to the hull of the tug had come into contact with the side shell plating of the barge, causing scratching of the paintwork and indentations to the plating.

**[20]** A note of protest was issued to the master of the tug by the master of the barge on the same day.

THE PLAINTIFF'S CASE

**[21]** The plaintiff mounted its claims against the defendant based on the tort of negligence. The plaintiff contended that the defendant owed a duty to exercise care in the navigation of the tug so as to avoid collision with the barge. The defendant is said to have breached its duty of care and by reason thereof caused damage to the barge.

**[22]** More specifically, it was contended that the defendant, being engaged to provide its services for the anchor deployment operation for the barge, breached its duty when it failed to take the necessary and reasonable

precautions to ensure that the tug would not collide onto the barge when she pulled away from the barge which had remained stationary at the time of the accident.

**[23]** The plaintiff relied on the doctrine of *res ipsa loquitor* and referred this court to the following passage in *Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the ' Borcos Takdir'* [2012] 5 MLJ 515 ('Borcos Takdir'):

> [41] *Res ipsa loquitur* allows a court to infer carelessness or negligence on the part of a defendant where the claimant can show that the nature of the accident suggests both negligence and the defendant's responsibility. The Latin term represents a rule of evidence and does not set forth a principle of law. As stated in *Clerk & Lindsell on Torts* (20th Ed): '... It is only a convenient and label to apply to a set of circumstances in which a claimant proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. *Res ipsa loquitur* which stems from the judgment of Erie CJ in *Scott v The London and St Katherine Docks Company* (1865) 159 ER 665; (1865) 3 H & C 596 applies where (a) *the occurrence is such that it would not have happened without negligence*, and (b) the thing that inflicted the damage was *under the sole management and control of the defendant*, or of someone for whom he is responsible or whom he has a right to control. If these two conditions are satisfied it follows, on a balance of probability that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: (c) there must be *no evidence as to why or how the occurrence took place*. If there is, then appeal to res ipsa loquitur is inappropriate for the question of the defendant's negligence must be determined on that evidence'. (Emphasis added.)

**[24]** The plaintiff further contended that in the event this court is of the view that the doctrine of *res ipsa loquitor* is not applicable, the evidence before this court would suffice to establish a breach of duty of care by the defendant and such breach had caused the damage to the barge.

**[25]** On the issue of quantum of damages, the plaintiff relied on its tabulation which sought to set out the particulars of its claims amounting to RM1,128,572.77. More will be said of this below.

THE DEFENDANT'S CASE

**[26]** The defendant contended that the plaintiff has failed to establish any breach of duty of care on the part of the defendant and therefore there was no negligence established against the defendant.

**[27]** More specifically, it is the defendant's contention that the doctrine of *res ipsa loquitor* does not apply in this case. In fact, the defendant's expert, DW1

had opined that the proximate cause of the accident was the prevailing current acting upon the tug. At para 4.1 of his report, DW1 stated as follows:

> 4.1 The barge marine team carried out an analysis of the incident when completing their accident/incident reports for their owners*13* and for Petronas*14*. *These reports place the prevailing current of 1.5 to 2.0 knots with direction 020° (T) as being the prime, or proximate, cause of the collision. I am in full agreement with these findings*. (Emphasis added.)

**[28]** DW1 testified that in his opinion the accident itself was not due to negligence but was rather a fortuity:

> YA: It was something that no one could have?
>
> DW1: Say again sorry?
>
> YA: It was something that no one could have what?
>
> DW1: Foreseen.
>
> YA: Foreseen?
>
> DW1: Yes, yes. The master would not have foreseen that happening, it would be pretty sure like he could pull away with the weight of the anchor cable and believe me, those are very heavy weights, alright. You can see, your witness yesterday, he said he could see the black smoke coming out of the funnel, that means master was, putting full power on his engine and a such movement, right.

**[29]** The defendant submitted that because the plaintiff had not adduced any expert opinion to rebut DW1's testimony, this court is not entitled to reject DW1's opinion and to substitute it with its own opinion on the matter.

**[30]** On the issue of quantum of damages, the defendant contended that the plaintiff had failed to prove the quantum of damages that it claimed it had suffered.

## LEGAL ISSUES

**[31]** Based on the parties' respective positions above, the following legal issues require the determination of this court:

(a) whether *res ipsa loquitur* is applicable under the facts of this case;

(b) whether the court is bound to accept the defendant's expert's conclusion; and

(c) whether the plaintiff has established its quantum of damages as claimed.

COURT'S CONSIDERATIONS

*Res ipsa loquitur — Its application in trial*

**[32]** Generally, to succeed in a claim for negligence, the plaintiff has the onus to establish the existence of a duty of care, a breach of that duty due and that the breach is the proximate cause for the injury to the plaintiff. In this regard, the doctrine of *res ipsa loquitur*, if applicable, allows the plaintiff to rely on the fact of the injury itself to raise an *inference* of negligence and that the negligence is the proximate cause to the plaintiff's injury, thus, a prima facie case is established without actual proof.

**[33]** To be clear, the doctrine of *res ipsa loquitur* does not shift the legal burden of proof from the plaintiff to the defendant at all. Whilst *res ipsa loquitur* makes it permissible for the court to draw an inference of negligence, the legal burden remains on the plaintiff to proof negligence on the balance of probabilities.

**[34]** *Res ipsa loquitur* which in English means 'the thing speaks for itself' is in fact, a rule of evidence.

**[35]** The *fons et origo* of the doctrine of *res ipsa loquitur* came from the case of *Byrne v Boadle* (1863) 159 ER 299; (1863) 2 H & C 722 . In that case, the plaintiff, while walking in the street, was injured by a falling barrel of flour from an upper floor of premises occupied by the defendant. The plaintiff was unable to tender evidence as to why or how the barrel fell. The defendant, after the close of the plaintiff's case objected to the fact that no evidence was tendered by the plaintiff to either connect the defendant to the occurrence or to prove negligence. The defendant presented no evidence. Pollock CB, ruling in favour of the plaintiff, made a reference to *res ipsa loquitur* holding that the mere fact of the accident is evidence of negligence.

**[36]** The classic exposition of the doctrine was however laid down by Erle CJ in *Scott v The London and St Katherine Docks Company* (1865) 159 ER 665; (1865) 3 H & C 596. The defendants in that case were in possession of a warehouse and a certain crane or machine for the powering of goods therefrom. Whilst lowering bags of sugar from the warehouse to the ground, six bags of sugar fell and injured the plaintiff who was lawfully passing by. The issue before the court in that case was whether at the end of the plaintiff's case, the plaintiff had established sufficient evidence for negligence against the defendants to warrant the submission to the jury. Apart from leading evidence that there was no warning call or barrier erected, no evidence was adduced as to the cause for the bags falling. In allowing the appeal, Erle CJ formulated the following principle that is now often cited:

> There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of case.

**[37]** The doctrine of *res ipsa loquitur* has been adopted and applied by our courts. More recently, in the *Borcos Takdir*, Justice Nallini Pathmanathan (now FCJ), held that for the doctrine to be applicable on the factual matrix of a case, the court must be satisfied of three conditions:

(a) the accident is such that it would not, in the ordinary course of things, have happened without negligence or if proper care had been taken ('first condition');

(b) the thing or instrumentality that inflicted the damage was under the sole management and control of the defendant, or of someone from whom he is responsible or whom he has a right to control ('second condition'); and

(c) there must be no evidence as to why or how the accident took place ('negative condition').

**[38]** In the present case, the defendant contended that the plaintiff cannot avail itself of the doctrine of *res ipsa loquitur* to prove its case as there is evidence before this court as to the cause of the accident as testified through the master of the tug, DW3 and the defendant's expert, DW1. In other words, the defendant is contending that the negative condition necessary for the application of *res ipsa loquitur* is not present in this case.

**[39]** The contention brings into focus the question as to the evidence, both direct and circumstantial, that the plaintiff needs to adduce at the trial by the end of the plaintiff's case to meet the level of proof required by the doctrine before a *prima facie* case based on an inference of negligence can be established.

**[40]** It is significant to note that the doctrine gives rise to an inference and not a presumption of negligence. This means that if at the end of the plaintiff's case, no evidence is proffered by the defendant, the court is not bound to find that liability has been made out and may still find that based on the overall evidence before the court, the plaintiff has still not discharged the legal burden of proving negligence on the balance of probabilities (a presumption would mean that the court will assume the existence of negligence whilst an inference means that it is merely permissible for the court to find the existence of negligence).

**[41]** The first condition, ie that the accident was such that it would not, in the ordinary course of things, have happened without negligence or if proper care had been taken needs to be clearly understood. A

**[42]** To my mind, what this means is that whilst the accident or occurrence in question could still happen even when there is no negligence or want of care, there is a higher probability that when it did happen, it is due to negligence or lack of proper care. In other words, the test is not whether a particular injury rarely occurs but rather that when it occurs, it is usually because of negligence ('the probability condition'). B C

**[43]** As an illustration, whilst it is possible that bags of sugar falling from a building can be due to unexpected strong gust of wind, this is rare since such falls are usually due to negligence or want of proper care. Thus, when the bags of sugar did in fact fall, in more cases than not, it is due to lack of proper care. This is what I understand the words, 'in the ordinary course of things' mean. D

**[44]** How then is the court to determine whether in respect of a particular incident, that in more cases than not, ie 'in the ordinary course of things', the same is due to a breach of duty of care? E

**[45]** Under the doctrine of *res ipsa loquitur*, the determination of the fact that 'in the ordinary course of things', such accident would only occur due to negligence, is based on common sense and experience. This means that the court must be able to rely on what is considered to be common sense and experience of the ordinary man to arrive at the conclusion that the accident would ordinarily only happen when there is negligence. F

**[46]** However, in certain circumstances, such probability condition may be outside the scope of ordinary common sense and experience. For example, in the case of an injury to a plaintiff that had arisen during a complicated surgical operation, an ordinary person would have no knowledge nor the experience to conclude that the said injury sustained would not have otherwise sustained but for some negligence on the part of the doctor who performed the surgery. G H

**[47]** It is in such events that expert evidence may be required to inform the court as to whether 'in the ordinary course of things', such injury as sustained by the plaintiff could only occur if no proper care was taken by the doctor. This is quite different from an expert being called with the view to prove the actual cause of the accident. I

**[48]** Translating the aforesaid to the trial process, what this means is that the plaintiff who is seeking to rely on *res ipsa loquitur* must lead and adduce the facts relating to the circumstances of the accident. The plaintiff has to show

what happened and the fact of injury or damage. In doing so, it may be necessary for the plaintiff to procure expert evidence to inform the court on the probability condition, ie that the accident in the ordinary course of things would only occur due to lack of proper care on the part of the defendant.

**[49]** Further, facts must also be adduced to satisfy the second condition which is that the 'thing or instrumentality' that inflicted the damage or injury to the plaintiff was under the sole management and control of the defendant, or of someone from whom the defendant was responsible or whom the defendant had a right to control.

**[50]** This condition is in fact the original justification for the doctrine of *res ipsa loquitur*. It is precisely because the defendant had sole control and management of the thing or instrumentality that inflicted the damage or injury to the plaintiff, which means that only the defendant and not the plaintiff who could adduce direct evidence bearing upon the issue of negligence, that *res ipsa loquitur* applies to permit a finding of the defendant's negligence based on circumstantial evidence.

**[51]** Accordingly, it seems to me that where there is no disparity of information, namely, where the plaintiff has access to the full direct evidence and sought to adduce evidence to proof the specific act of negligence to establish a prima facie case of negligence, it is generally accepted that the plaintiff ought not to be permitted to invoke *res ipsa loquitur* and to obtain the procedural advantage of an inference to which the plaintiff is not equitably entitled. To my mind, the aforesaid is what the negative condition is intended to address and to be applied.

**[52]** What this means is that at the close of the plaintiff's case, if the plaintiff is able to satisfy the three conditions, the plaintiff's case cannot be struck out on a submission of no case to answer by the defendant. The plaintiff needs not factually establish a case of negligence and instead by virtue of the doctrine of *res ipsa loquitur*, an inference of negligence and that the negligence is the proximate cause of the accident has been raised or deduced from the circumstances of the case.

**[53]** The evidential burden then is shifted to the defendant to rebut the inference of negligence. The defendant (if submission of 'no case to answer' is not made at the close of the plaintiff's case), may either seek to refute that the requirements for *res ipsa loquitur* are satisfied, thus contesting the application of the doctrine to the case or the defendant may choose to establish that he had exercised due and proper care in the circumstances of the case ie challenging the probability condition or that on the balance of probabilities, there is in existence, a separate non-negligence cause for the accident or occurrence that is

more probable than the inference of the negligence established by the plaintiff. A

**[54]** Put it simply, where *res ipsa loquitur* applies, at the end of the defendant's case, there must be evidence before the court as to how and why the accident had occurred that is not due to any negligence on the part of the defendant. The failure for the defendant to establish such evidence means that the inference of negligence has not been displaced or to put it in another way, the doctrine of *res ipsa loquitur* has not been precluded. B

*Res ipsa loquitur — Whether conditions satisfied in this case* C

**[55]** In the present case, there is no dispute that the thing or instrumentality that had inflicted the damage to the barge was the anchor deployment operation carried out by DW3, the master of the tug on 19 June 2020 as he was manoeuvring the tug towards the barge to pick up the P2 anchor socket with the view to lay the anchor P2 at its pre-planned position. Anchor P2 was the final anchor to be laid. D

**[56]** In respect of the above, the plaintiff had procured PW1, the captain of the barge to testify on what had happened on 19 June 2020 during the anchor deployment operation. PW1 testified that on that day, the tug had proceeded to snatch the P2 anchor socket from the barge but failed. She then sought to move nearer to the barge and had 'experienced a strong current which was pushing her towards Two Eastwind' which had resulted in the tug ending alongside the barge. E F

**[57]** After picking up the P2 anchor socket and securing it at the tug's sharkjaw, the tug began to pull out from the barge. According to PW1, he was in the barge's control room at the time but could still see that the prevailing current at the time was strong and that the tug was struggling to pull away. PW1 testified that he had observed black smoke coming out of the tug's funnel indicating that she was 'struggling' to pull away. He further testified that although the current was strong on that day, it was never identified as a potential hazard to the operation at all. He testified that the tug had faced restricted manoeuvrability and in the process of pulling away, her port side made contact with the barge causing damage of between 6metre length and 5cm deep to the port bow hull of the barge above the water line. G H

**[58]** The plaintiff also called PW2, a surveyor with Harper Wira Surveyors Sdn Bhd to testify. PW2 attended on the barge about three months after the accident. He did not interview PW1, the master of the barge at the material times nor any of the officers on board at the time of the accident. I

**[59]** PW2 candidly conceded that he has no sailing experience and was

testifying as a surveyor to ascertain the extent of the damage to the barge arising from the accident. He confirmed having read the incident reports or statements by PW1, the chief officer and the marine controller and opined that the damage to the barge was consistent with the tug coming into contact with the barge as recorded in the said reports and statements. He did not interview the master of the tug, DW3.

**[60]** Quite clearly, PW2's opinion on what had happened on 19 June 2020 is inadmissible as it is hearsay evidence. However, this does not mean that PW2 cannot proffer his opinion based on the assumption that the records or statements were true. It is within PW2's area of expertise to comment whether the extent and nature of the damage to the barge is or is not consistent with the events as recorded in the statements made available to him.

**[61]** In this case, there is no dispute that the entire anchor deployment operation relating to the anchor P2 was within the sole control and management of DW3, the master of the tug.

**[62]** In fact, both DW1 and DW3 also testified that it was during the tug's pulling away from the barge that had led to the damage to the barge. In the process of pulling away, the tug's tyre fender made contact with the barge and fell into the sea, thereby exposing its eye pads. The tug's aft port quarter and the said fender's eye pads had come into contact with the barge's port bow side, thereby causing damage to the same. The pulling away was an operation that was solely in the control and or management of the master of the tug.

**[63]** In this case, the defendant, quite sensibly, is not disputing that the pulling away manoeuvre by D3, the master of the tug, in the ordinary course of things, if proper care had been taken, would normally not have resulted in any collision or contact with the barge. After all, the barge was effectively stationary at the material times with a total of seven anchors already laid at the time of the accident. Based on common sense and experience, when an allision happened, it is usually because the vessel that was engaged in the manoeuvring that had failed to take proper care.

**[64]** The master of the tug on his own accord had made the decision to pull away from the barge. He alone had the sole control and possession of the tug and the manoeuvring process. He alone had the exclusive knowledge of the conditions and the limitation factors that were at play when pulling away the tug from the barge at the time.

**[65]** Accordingly, learned counsel for the defendant, quite rightly, conceded that the first condition and the second condition of *res ipsa loquitor* are satisfied in this case.

**[66]** However, as alluded to above, learned counsel for the defendant contended that in this case, the third condition which is the negative condition is not satisfied. A

**[67]** The negative condition requires that there must be no direct evidence as to how and why the accident had taken place. In this regard, it was contended that because the master of the vessel, DW3 was present at the trial and the fact that he had testified on the events on 19 June 2020, this necessarily means that the cause of the accident cannot be said to be unexplained and or that there is no evidence as to how or why the accident had occurred since DW3 can give direct evidence on the same. B C

**[68]** Similarly, the defendant had also procured their expert, DW1 who is a marine consultant with a mechanical engineering degree to proffer his opinion as to how and why the accident had occurred. This again negates the satisfaction of the negative condition for the application of *res ipsa loquitor* to the present case. D

**[69]** In support, learned counsel for the defendant referred this court to the facts in the *Borcos Takdir*. That was a case also involving an anchor laying operation. The anchor handling tug took on the anchor and dropped it over a pipeline, resulting in damage to the same. Central to the court's consideration in the *Borcos Takdir* was the question of why the tug dropped the anchor at that one particular spot. The learned judge observed that the master who would be able to give primary evidence in answer to this issue, was not called to give evidence. The failure to call the master meant that there was no evidence as to why or how the occurrence took place, which thus allowed for the court's reliance on *res ipsa loquitur*. E F

**[70]** Is the proposition that because the master of the tug was present at the trial to testify and or that since an expert's opinion has been procured by the defendant to proffer on the possible cause(s) of the accident, this must necessarily mean that there was before this court direct evidence on the why and how the accident had taken place, and therefore the negative condition is not satisfied to bring into application the doctrine of *res ipsa loquitur*? G H

**[71]** I do not think so.

**[72]** As I have stated above, the underlying justification for the application of the doctrine of *res ipsa loquitur* was to address the asymmetric access to information on the actual cause of the accident. This is because at the time prior to the accident up to the time of the accident, it was the defendant who had exclusive control of the instrumentality which caused the damage. The fact that the defendant had exclusive control over the instrumentality placed him in I

a better position to know the facts and by permitting the plaintiff to prevail based on circumstantial evidence would compel the defendant to divulge the information that is exclusively in the defendant's possession.

**[73]** From the aforesaid analysis, one can immediately see the flaw in the submission of learned counsel for the defendant. The fact that DW3, the master of the tug had testified on the accident and or the fact that the defendant had procured DW1 as its expert to opine on the possible cause(s) of the accident, does not mean that the negative condition for the application of *res ipsa loquitur* is not satisfied. It is precisely because the instrumentality of the accident was solely within the control and management of the defendant that the defendant could procure testimonies to be given on the cause of the accident. It is through DW1's and DW3's testimonies that the defendant is seeking to displace the inference of negligence which the plaintiff had the benefit of vide the procedural device of *res ipsa loquitur*. In other words, the testimonies of DW1 and DW3 cannot be taken as a negation of the negative condition but instead introduced by the defendant to support its case to negate or rebut the inference of negligence which the plaintiff has established at the end of its case in reliance on the doctrine of *res ipsa loquitur*.

**[74]** Accordingly, it is my judgment that all the three conditions for the application of *res ipsa loquitur* have been met by the plaintiff in this case.

**[75]** As the plaintiff has established a prima facie case based on the inference of negligence under the doctrine of *res ipsa loquitur*, the defendant will need to displace the inference by either satisfying this court that due and proper care was taken during the pulling away process and or that there was another possible non-negligence cause for the accident that has a higher probability than the inference from the circumstantial evidence adduced by the plaintiff.

*Has the defendant rebutted the inference?*

**[76]** Following the aforesaid, this court will now have to consider whether the defendant has successfully raised an explanation and or other possible cause(s) that would displace the inference of negligence that the plaintiff has established in reliance on the doctrine of *res ipsa loquitur.*

[77] In this regard, if the defendant is seeking to show that there are other non-negligence causes that are more probable, it will not suffice to establish a neutral event in the sense that the accident is consistent with no negligence as with negligence. The competing cause proffered must be more probable than the inference raised by the plaintiff based on the doctrine of *res ipsa loquitur* (see: *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 ; [2017] SGCA 65).

**[78]** Alternatively, the defendant can demonstrate that in respect of the pulling away manoeuvre, it has exercised all due and proper care and was therefore not negligence. By this, the defendant is contending that the accident had occurred even when the master of the tug had taken all proper care — in other words, the accident was inevitable and therefore cannot attract any liability on the part of the defendant.

**[79]** In this case, the defendant's expert, DW1 had identified two main factors as contributing to the accident, namely, the change to the anchor pattern resulting in the sequence of anchor deployment to be altered that was made on the morning of 19 June 2020 and the prevailing current condition at the time of the accident.

**[80]** More specifically, DW1 opined that had anchor S2 been made the final anchor instead of the anchor P2 as originally planned, the heading of the barge could have been altered to minimise the effect of the prevailing current condition. This would have allowed relatively easier manoeuvre for the tug.

**[81]** More specifically, DW1 opined that 'had the prevailing current not been there, or had its existence been identified as a potential hazard by the team who planned the operation, then the collision, under the circumstances of the collision, would not have occurred'.

**[82]** By the aforesaid, the defendant is proffering alternative possible causes for the accident, namely that the change to the sequence of anchor deployment and the strong current at the material time being the proximate cause for the accident.

**[83]** During his cross-examination, DW1 suggested that by reason of the change to the sequence of anchor deployment and the prevailing current condition at the time, the accident was an 'inevitability or a fortuitous' event. This was what he testified:

EMILY: It was a?

DW1: A fortuity, okay. It was something that no one could have predicted.

YA: No one could have?

YA: It was the something that no one could have?

DW1: Say again sorry?

YA: It was something that no one could have what?

DW1: Foreseen.

YA: Foreseen.

A DW1: Yes, yes. The master would not have foreseen that happening, it would be pretty sure like he could pull away with the weight of the anchor cable and believe me, those a very heavy weights, alright. You can see, your witness yesterday, he said he could see the black smoke DW1coming out of the funnel, that means Master was putting full power on his engine and a such movement, right.

B ...

YA: Yeah, at the start of the operation and the time when the incident occurred, had remained more or less the same. Another words, there is really no significant change in the current condition throughout the operation, would you agree with me, or ...

C DW1: Yeah, yeah. So, I think, if you want my honest opinion here, for your benefit, I say that it was a fortuity, I think it was actually was going to happen, okay. That was always going to happen, right. It was an inevitability.

D **[84]** By the aforesaid, I understand DW1's contention to mean that DW3's skills and judgment in the manoeuvring of the tug to pull away from the barge played no part at all to the accident. Put it differently, whether DW3 had exercised due and proper care or not in his manoeuvring and navigation of the tug would made no different at all. With the change to the sequence of anchor deployment and the then prevailing current condition, the accident was bound E to happen.

**[85]** With respect, I fail to see how such a conclusion can be supported given the evidence in this case.

F

**[86]** To my mind, it is not insignificant that the master of the tug, DW3 had confirmed that prior to commencing the operation on 19 June 2020, there was a toolbox meeting to assess the conditions and the risks or hazards that the tug may encounter in the performance of the anchor deployment operation. G Significantly, there was no discussion recorded indicating any concerns raised about the change to the sequence of the anchor deployment or any related hazards or risks arising therefrom even when this was already made known to him. Neither was there any indication that the prevailing current of 1.5 to 2.0 knots were deemed as unsafe or risky to carry out the operation.

H

**[87]** There is no dispute that the defendant was fully aware of the prevailing current condition which had remained constant throughout the two day operation from 18 June 2020 to 19 June 2020. Although the master of the tug, D3 had testified that the 'current was strong' when the tug was approaching the I barge to snatch the P2 anchor socket and when the tug was casting off to pull away from the barge, there was no evidence adduced to show that the prevailing current condition then had significant changed beyond the 1.5 to 2.0 knots.

**[88]** What this means is that both the factors, namely, the change to the

anchor pattern for the anchor deployment operation and the prevailing current condition were known to the defendant prior to the tug's commencement of the anchor deployment operation on 19 June 2020 and before she proceeded to pick up the P2 anchor socket. If indeed DW1 is right, one would have expected DW3 to issue a notice of protest or to halt the anchor deployment operation all together.

*Expert evidence*

**[89]** Learned counsel for the defendant had contended that since the manoeuvring during anchor deployment operations is a highly technical field, expert evidence is needed to determine the cause for the accident. Thus, questions relating to the impact due to the change made to the anchor pattern and the effect of the current condition prevailing at the time of the operation on the tug would be beyond the range of common experience or common knowledge of this court.

**[90]** In this connection, it was contended that the defendant had made clear of its intention to call an expert from the outset, and did in fact call an expert to assist this court. The plaintiff had however opted to commence its case without expert evidence. Its belated attempts to call an expert — after expressly closing its case — were rejected by this court.

**[91]** Accordingly, it was submitted that since the defendant's expert's opinion was not rebutted by another expert appointed by the plaintiff, this court is not entitled to reject DW1's opinion and seek to substitute it with its own opinion on the matter. This is because the subject matter is one that is outside the learning of the court and it would be erroneous for the court to form an opinion which could only be properly concluded with the aid of expert evidence.

**[92]** More specifically, in *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 ('Syed Abu Bakar bin Ahmad'), the court held as follows:

> *There are however cases in which the court is not in a position to form a correct judgment without help of persons who have acquired special skill or experience on a particular subject, eg when the question involved is beyond the range of common experience or common knowledge or when special study of a subject or special training or special experience therein is necessary. In such cases the help of experts is required.* In these cases, the rule is relaxed and expert evidence is admitted to enable the court to come to a proper decision. (Emphasis added.)

**[93]** Further, as was observed by the Federal Court in *U Television Sdn Bhd & Anor v Comintel Sdn Bhd* [2017] 5 MLJ 292; [2017] 10 CLJ 580 ('U

Television'):

> [50] The High Court found that there was a need for technical evidence but, however, it preferred the evidence of the plaintiff on the basis of its so-called technical witnesses. It is our judgment, when it was determined that *there was a need for technical evidence, it was incumbent on the plaintiff to lead evidence through experts. It did not do so and by reason of that failure had failed to discharge its 'burden of proof' under ss 101 and 102 of the Act*. Consequently the *'onus of proof' did not shift to the defendants* to dislodge the assertions made by the plaintiff as the claimant. (Emphasis added.)

**[94]** The Singapore Court of Appeal also stated in *Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1 ('Saeng-Un Dom') as follows:

> When a judge is confronted with expert evidence on a matter which is outside the learning of the court and *such evidence is unopposed and is based on sound grounds and supported by basic facts*, he is not entitled to reject it and substitute it with his own opinion on the matter. (Emphasis added.)

**[95]** With respect, in my judgment, it is not correct to state that expert evidence can only be challenged by another expert and that the failure by a party to call his own expert necessarily means that the court is bound to accept the evidence by the expert called by the other party. Indeed, the aforesaid was not suggested by both the court in *Syed Abu Bakar bin Ahmad* and *U Television* at all. There could be many justifiable reasons why a party may choose not to call an expert of his own. Apart from the obvious question of costs, one may be confident that he could undermine the testimony of the expert called by the opposing side or that the testimony of an expert is not necessary.

**[96]** In this case, the plaintiff had opted not to call an expert because it was seeking to rely on the doctrine of *res ipsa loquitur*. Furthermore, the facts of this case are not so complicated and technical that this court is not able to draw on its own common sense and experience to determine that in the ordinary course of the tug navigating to pull away from a stationary barge, the accident would not have occurred if due and proper care and skill had been taken.

**[97]** In the present case, the opinion of DW1, is with respect, not based on sound grounds or supported by facts. Thus, this court is not bound to accept his opinion even in the absence of any expert called by the defendant.

**[98]** The law is that there is no inevitable accident unless the defendant can prove that something happened over which he had no control and the effect of which could not have been avoided by the exercise of care and skill — *The Schwan-The Albano* [1892] P 419 :

> There is the law laid down by the Court, and that only leaves open this — What is

> the proper definition of inevitable accident? To my mind these cases shew clearly what is the proper definition of inevitable accident as distinguished from mere negligence — that is a mere want of reasonable care and skill. *In my opinion, a person relying on inevitable accident must shew that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill.* That seems to me to be the very distinction which was taken, and was meant to be taken, between the case of inevitable accident and a mere want of reasonable care and skill. (Emphasis added.)

**[99]** Based on my finding set out above, it is my judgment that the present case, this was certainly not an accident that was inevitable at all. Not only did the defendant fail to the marine controller to put to him that the change to the anchor pattern with the prevailing known current condition at the time would lead to the inevitable accident, as I have mentioned, the master of the tug, DW3 himself did not think so as well. And, if indeed that was the case, the accident could have been avoided by the master of the tug simply refusing to commence the anchor deployment.

**[100]** Accordingly, it is my judgment that the defendant has not established on the balance of probability that there was another probable cause for the accident which did not involve negligence on the part of the defendant and which is more probable than the inference of negligence established by the plaintiff based on the doctrine of *res ipsa loquitur.*

*Proper care by the master of tug?*

**[101]** The master of the tug, DW3, on the other hand sought to defend his position on the ground that he had exercised proper care and had not been negligent when he manoeuvred the tug to pull away from the barge. DW3 testified that in order to pick up the P2 anchor socket, the tug had come 'very near' alongside the barge. According to DW3, the P2 anchor was already on board the tug at that time.

**[102]** After picking up the P2 anchor socket, DW3 testified that the anchor socket was then secured to the anchor wire on board the tug. Thereafter, the master tried several times to pull away from the barge but was unsuccessful. He testified that he could not reverse the tug much due to the position of the P1 anchor and neither could he move forward the tug much due to the positions of the anchors P3 and P4. He then asked PW1, the master of the barge to change the heading of the barge but was told that this could not be done. He stated that due to the prevailing current condition, the tug also could not move sideways. In other words, the tug had limited room to manoeuvre if the barge did not change her position.

**[103]** Yet, DW3 proceeded to pull away anyway and he engaged full engine

A powers and the tug's bow thrusters to manoeuvre the tug by turning starboard out and in the process, her tyre fender at its port stern side contacted the barge and fell down to the sea. As the tug was pulling away, the tug's port stern side then made contact with the barge's bow port side which caused the damage and indentations to her shell plates.

B

**[104]** DW3 quite candidly admitted that he was in charge of manoeuvring the tug at the material times. However, when asked if he was to be faulted for the accident, DW3 said that it was not his fault as he 'had followed all the procedure'. He further testified that if he had to do the operation all over again, he would have changed the sequence of the anchor deployment by throwing the anchor P2 first before the anchor P1. This would have resulted in more room for the tug to manoeuvre.

C

D **[105]** From his testimony, DW3 did not ascribe any negligence on his part, suggesting instead that the accident could have been avoided had the barge changed its position as he had requested and or that the anchor P2 be deployed ahead of the anchor P1.

E **[106]** From the above testimony by DW3, can it be said that the defendant has successful established on the balance of probabilities that the master of the tug was not negligent? I do not think so.

F **[107]** It must be borne in mind that the defendant was engaged as a support vessel to perform anchor mooring or deployment operation. The plaintiff was entitled to rely on the defendant's expertise and experience in the discharge of its contractual duties in undertaking the anchor deployment operation.

G **[108]** Whilst it is true that the anchor pattern was planned by the marine controller and there were changes made to the sequence of the anchor deployment on 19 June 2020, the defendant had raised no objections or concerns at the toolbox meeting on 19 June 2020 vis a vis her ability to discharge her contractual duties for the anchor deployment operation. If the

H master of the tug had issues with the restricted room for manoeuvrability as the result of the anchor P2 being deployed last, this could have been raised before the commencement of the operation on 19 June 2020.

I **[109]** Significantly, it was common ground that the prevailing current condition at the time of the operation on 19 June 2020 was not abnormal. The current of 1.5 to 2.0 knots at the time was known to the defendant at the commencement of the operation and there was no change to this during the snatching operation. Indeed, the same prevailing current condition was encountered on 18 June 2020.

**[110]** However, from the evidence by the master of the tug, DW3, it would appear that the tug had come alongside the barge when she picked up the P2 anchor socket from the barge. The tug had found herself in the alongside position when she was unable to perform the snatching operation due to the current acting abeam her starboard side. The circumstances leading to the tug being alongside are not irrelevant.

**[111]** The master had made the decision to swing the tug to port instead of proceeding by the normal perpendicular to the tug's stern approach (where the tug's twin propellers could maintain distances from the barge and the tug's bow thrusters maintaining the heading) to make the tug at an angle of about 45 degree to the barge so that the current would be acting on the tug's starboard quarter to pick up the P2 anchor socket. However, the master had 'allowed' the current to cause the bow of the tug to continue swinging the tug to port, eventually bring her alongside the barge.

**[112]** As testified by PW1, the master of the barge, the master of the tug could have refused to come alongside the barge to avoid ending up so near alongside the barge. Whilst the aforesaid had enabled the P2 anchor socket to be picked up, the position of the tug alongside the barge had resulted in limited manoeuvrability space for the stern of the tug when the master wanted to pull the tug away from the barge.

**[113]** Significantly, from DW3's testimony, it is clear that DW3 was fully aware of the limited space and the tug's restricted manoeuvrability due to the existing positions of the deployed anchors, P1, P3 and P4. He testified that he made a few unsuccessful attempts and even contacted the master of the barge to change the barge's heading but was told that it could not be done.

**[114]** Notwithstanding the aforesaid, DW3 had proceeded to pull away and in the process, the port stern side of the tug and her tyre fender collided with the barge's port bow.

**[115]** To my mind, it was clearly an error of judgment by the master of the tug when he attempted to manoeuvre the tug to pull away from the barge. As suggested to DW3 by learned counsel for the plaintiff, it was incumbent upon him as the master of the tug to ensure that in his manoeuvre of the tug to pull away from the barge, he would not cause any damage to the barge which was effectively stationary. In the job hazard analysis prior to the operation, the risks of a collision between the tug and the barge was expressly identified. The tug was to maintain good and safe speed of manoeuvring at all times.

**[116]** Instead, DW3 had allowed the tug to come too near alongside the barge. This had created the limitation and restrictions to her manoeuvrability

to pull away from the barge. The situation was not a fortuity but a result of a lack of care or a failure to take necessary avoidance steps. Then there was the decision to proceed with the pulling away notwithstanding the awareness by DW3 that there was a high risk of a collision if the barge's heading could not be changed. DW3 knew of this risks since he had sought for the barge to change her heading.

**[117]** Finally, notwithstanding that the barge's heading could not be changed, it was DW3 who decided to proceed ahead to pull away despite the risks. It was his duty to make sure that if he pulls away, he would not cause any damage to the barge. If he was unsure, DW3 could have discussed the situation with the marine controller and reserved his position on the possible risks if he were instructed to proceed notwithstanding the restricted manoeuvrability.

**[118]** It is also not an accepted excuse to point to the prevailing current condition at the time as the cause for the accident. It is common ground that the prevailing current of 1.5 to 2.0 knots on 19 June 2020 was not unusual and or unexpected. It was the same current throughout the two day operation on 18 June 2020 and 19 June 2020. In fact, the current was never identified as a potential hazard for the operation at all.

**[119]** Accordingly, it is my judgment that not only has the defendant failed to displace the inference of negligence in this case, based on the evidence that DW1 and DW3 had adduced, it is also established that on the balance of probabilities, the cause of the accident was due to a breach of duty of care by the master of the tug, DW3.

*Plaintiff's burden to proof damages*

**[120]** Arising from the damage to the barge, the plaintiff claimed a sum of RM1,128,572.77 as damages. The breakdown for the said sum is tabulated in the plaintiff's written submission. This comprised the expenses incurred for:

(a) 'office representatives' for evaluating the damages;

(b) agency fees for engaging the tug, Two Kasturi to tow the barge from Miri to Berjaya Dockyard;

(c) the chartering costs, fuel and water consumption of Two Kasturi;

(d) the operation costs for the barge, repair costs to the barge;

(e) agency costs for the trip from Berjaya Dockyard to Kemaman; and

(f) miscellaneous expenses.

**[121]** It must be said from the outset that the plaintiff's presentation of its

claims for damages come across as wholly unsatisfactory. In fact, no supporting documents were initially filed in court at the trial in support of the plaintiff's claims. This was demonstrated during cross-examination of PW2 and immediately thereafter, learned counsel for the plaintiff had to seek leave of this court to file a fresh bundle comprising the supporting documents.

**[122]** Notwithstanding that leave was given, the documents that were filed also fail to provide the necessary trail to substantiate the plaintiff's claims. More specifically, it must be noted that:

(a) not all the sums claimed are supported by documents. For instance, the sums claimed for 'operation costs for the barge' in respect of water consumption and crew wages made no reference to any supporting documents at all;

(b) where sums claimed are supported with references to invoices, these invoices were made out to one 'Two Offshore Marine Sdn Bhd' and not to the plaintiff. More significantly, in respect of most of these invoices, there are no documents to show that the invoices were in fact paid, let alone paid by the plaintiff; and

(c) whilst there are some payment vouchers that were included in the bundles, for example, payment vouchers for marine gas oil and 'cash advances for crew food provision', no explanation was proffered as to the correlation between these expenses incurred with the damages caused by the accident.

**[123]** Significantly, with respect to the repair costs for the barge totalling RM601,762.12 by Berjaya Dockyard, the invoice appeared to be based on a quantity of 5.65299 tonnes of steel used. This was stated to be for four shell plates, seven long stiffener angle bars, one fender plate and 11 ship name plates.

**[124]** However, PW2 had specifically testified that the ship name plates were undamaged. Yet, the plaintiff had included the renewal of these name plates as part of its claims.

**[125]** As regard the shell plates, the plaintiff's pleaded case is that the damage to the shell plates measured at 16meters long by roughly 5meters wide. More specifically, para 9 and 12 of the statement of claim stated thus:

> 9. As a result of the said collision, the hull of the Plaintiff's Vessel had suffered indentation and upon inspection by the Plaintiff's surveyor, Harper Wira Surveyors Sdn Bhd, the indentation of the hull plate was measured at approximately 16 meters long by roughly 5 meters wide, with multiple longitudinal and transverse framing affected.
>
> The Plaintiff shall tender all the relevant evidence and documents during the trial.

A Particulars of Physical Damage

i. Indentation of hull plate measuring approximately 16 meters long and roughly 5 meters wide, with multiple longitudinal and traverse framing affected.

B ii. Scratches measured at approximately 4–6 meters at the port bow.

**[126]** However, during the trial, both the defendant's surveyor (DW2) and expert witness (DW1) had testified that the actual damage to the barge measured at only 7.5meters long by 1.1meters wide.

C

**[127]** Significantly, PW2, the plaintiff's surveyor had during cross-examination conceded that the plaintiff's pleaded measurement is wrong. It is necessary to reproduce what PW2 said below:

D AARON: Paragraph 3 of that same page, 'Indentation of hull plate measuring approximate 16 meters long by roughly 5 meters wide was noted, with multiple longitudinal and transverse framing affected'.

PW2: Yup.

AARON: Do you still stand by this statement? Yes or no?

E

PW2: No.

YA: No? You don't stand by this statement?

PW2: No.

F

**[128]** In fact, PW2 conceded that the extent of the damage was very close to what DW1 and DW2 had testified:

AARON: How do you correct it? What is the extent of damage?

G PW2: Okay. The visible damage indentation from the inside of the vessel would be roughly about 7.5 meters long, it would be about 1.5 meters wide. But looking from the outside, you can see that the scarring or the scratch starts from almost the forward section, forward bow, all the way up to the first set of fenders which is roughly about 9 meters long. As to the height of the affected area, it would be roughly in the regional 1.5 to 2 meters.

H

AARON: And this was based on your observation on your attendance on 1st October, correct?

PW2: Yes. The photographs were taken by myself, and also upon a subsequent review.

I

**[129]** In respect of the damage to the barge based on the dimension of 7.5meters long by 1.5meters wide (as conceded by PW2), the amount of steel utilised to repair the barge of 5.652 tonnes as stated in the invoice issued by Berjaya Dockyard was admitted by PW2 to be inaccurate. This was what he

said:

AARON: Yes. The witness is being very candid, My Lord. Part B, page 83. Now, we have under Part B1, 'Outfitting: Repair damage, includes remove existing side shell plate, include shell long stiffener, collar plate, plate fender, etc. Install side shell plate, shell long stiffener, collar plate, plate fender and vessel name. Renewal of mild steel plate material, a total of 5,652 tonnes'. So, 5,652 kg of steel was utilize to repair damage which by your own evidence was, 7.5 meters long by 1.5 meters wide, is that accurate? Yes or no?

PW2: No.

AARON: Or you don't know?

PW2: No.

**[130]** Further, PW2 also that the Berjaya Dockyard invoice had included works on the ship's name plates when the lettering was never damaged by the tug from the accident:

AARON: Yet, if we go back to page 82 of Enclosure 49, if we look at the Berjaya Dockyard invoice, at B1, the last line above painting area, ship name plate Two Eastwind 770 mm long x 500 mm wide x 8 mm thick x 11 pcs.

PW2: Yes.

AARON: I would suggest that this particular portion shows that owners replace the lettering of Two Eastwind at dockyard, agree or disagree?

PW2: Yes.

AARON: Yet, there was no damage to the lettering, agree or disagree?

PW2: Yes.

**[131]** The same also applies to the painting for the same area:

AARON: Now, we are still at page 83. Painting area. You have no evidence … you're not from Berjaya Dockyard, you have no evidence to … you're not in the position to give evidence as to correctness of what was done here, correct? In term of painting area?

PW2: Yup.

**[132]** The effect of the aforesaid is that the invoice issued by Berjaya Dockyard for the repair costs totalling RM601,752.12 cannot be relied upon as representing the loss or damage to the barge caused by the accident.

**[133]** Regrettably, no evidence was led by the plaintiff to assist the court to assess what would be the actual repair costs that the plaintiff sustained arising from the damage that was caused to the barge arising from the accident.

**[134]** It is trite that the plaintiff bears the burden to prove its pleaded case and to establish its quantum of damages. As it stands, the documents placed before this court do not support the plaintiff's quantum of claims at all.

**[135]** In fact, it was established at trial and, may I also add, also conceded by PW2, that the barge was already due for her annual class survey and would have gone in to dry dock whether or not the accident had happened. This is clear from the documents before the court, namely the survey status report on the barge:

**Classification Surveys**

| Survey name | Last | Due Date | Range (from, to) | Postponed | Status |
|---|---|---|---|---|---|
| Hull - Renewal | | 13 Jan 2023 | 13 Oct 2021 - 13 Jan 2023 | | |
| Hull - Annual for Renewal | | 13 Jan 2023 | 13 Oct 2022 - 13 Jan 2023 | | |
| Hull - Annual | 27 Feb 2020 | 13 Jan 2021 | 13 Oct 2020 - 13 Apr 2021 | | |
| Annual survey of structure | 27 Feb 2020 | 13 Jan 2021 | 13 Oct 2020 - 13 Apr 2021 | | |
| Hull - Intermediate | | 13 Jul 2020 | 13 Oct 2019 - 13 Apr 2021 | | Within window |
| Bottom Survey in Dry Dock or afloat | | 05 Nov 2020 | 05 Nov 2020 | | Limit Date in less than 5 m. |

**[136]** PW2 also confirmed the aforesaid in his cross-examination:

> AARON: 'On 26.11.2021, the Plaintiff's Vessel was subsequently towed by vessel 'Two Kasturi' to Berjaya Dockyard Sdn Bhd at Miri to repair the damages sustained by the Plaintiff's Vessel arising from the said collisions'. Is this statement accurate?
>
> PW2: No entirely.
>
> AARON: And why is it inaccurate?
>
> PW2: We are aware that at the material time, when the vessel went into dry docking, it was due for classification survey as well.
>
> AARON: Yes. Do you know when she was due for class survey?
>
> PW2: If my memory serves me correct, by the latest that the dry dock would have been deal, would have been either January or February 2023. And I think there is an extract of the BV class maintenance record somewhere.

**[137]** The means that the barge would have gone in for dry dock in any event. In other words, the tow charges, mooring charges and all other related charges arising from the dry docking of the barge would have to be incurred by the plaintiff even if the accident had not occurred. This was confirmed by PW2:

> AARON: So, I will suggest to you Mr Sim, that the vessel was schedule to go in for dry dock, anyway, correct?
>
> PW2: Yes, correct.
>
> AARON: Irrespective of whether the incident have happened or not, she would have had to go in Berjaya Dockyard for drydock, agree or disagree?

PW2: Agree.

AARON: Now, Two Eastwind is a non-propel the vessel, correct?

PW2: Correct.

AARON: To go in, she would require the assistance of tug anyway as per A3, agree?

PW2: Yes.

**[138]** PW2 was also being candid when he agreed with learned counsel for the defendant that it is not possible to determine from the Berjaya Dockyard invoice submitted as to which part of the repair works were incurred as a direct result of the accident and which part of the repair works would have been incurred as a matter of course due to the barge annual class survey. This was what he said:

AARON: A4, provision of dockmaster service, would you be able to say, or your own personal knowledge, if this relates to drydocking and her annual surveys, or specifically relates to repairs as a result of this incident?

PW2: It would ... theoretically it should relate to both.

AARON: To both?

PW2: Yup.

AARON: But as I said earlier, and you have agreed, she would have gone in anyway?

PW2: Yes, she would have gone in anyway.

AARON: As such, she would have incurred these charges, even if the collision or contact had not happened, agree, disagree or you don't know?

PW2: ...

AARON: Ya, I'm not looking for an explanation. Can you tell, which relates to the annual survey and which relates to the contact incident itself? Can you by reference to this document alone?

PW2: For the entirety of Section A, no.

AARON: You save me a great deal of time.

PW2: Let's save the time if we can.

**[139]** Regrettably no one from the Berjaya Dockyard was called by the plaintiff to testify on what were the repair works to the barge that were directly caused by the accident.

**[140]** When learned counsel for the plaintiff was asked to assist the court to arrive at a figure for the damages sustained by the plaintiff arising from the accident, all that learned counsel did was to maintain that the plaintiff is relying on the invoice issued by Berjaya Dockyard. No further help was provided to the

court notwithstanding that a further opportunity was given by the court for the plaintiff to file an additional written submission in support of the plaintiff's claims for damages.

**[141]** In effect, what the learned counsel for the plaintiff had chosen to do was to throw all documents to the court and expect this court to work out a 'fair' quantum to address the loss sustained by the plaintiff arising from the accident. Learned counsel for the plaintiff failed to understand that a claim for damages, in particular, special damages, must be properly supported by documents and is not a matter of discretion of the court.

**[142]** Learned counsel for the defendant referred this court to the following passage from *KC Leong Holdings Sdn Bhd v Datin Moh Bee Ling* [2015] 7 MLJ 10; [2014] 1 LNS 741 which I agree aptly applies to the present case:

> [64] *On scrutiny of the invoices, I find that the items therein comprise of purported remedial work beyond those dealt under the third issue herein. In other words, there is a lot of other unexplained work. The defendant has merely collated all her payments made to the rectification contractors and held them entirely to the account of the plaintiff. This is plainly unsatisfactory and does not meet the requirement of proof of damages as held by the Court of Appeal in Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611; [2007] 2 AMR 229. In building contract litigation, I have expected the complainant to carefully sieve through and tabulate each and every relevant defect and the costs of remedying them systematically preferably also in a Scott schedule. The tabulation must cross refer to the defect as substantiated preferably by photographic records or other cogent mode of proof together with the corresponding item of expenses or costs incurred to remedy the defect as substantiated by the work invoices. The complainant must in honesty disregard those works that constituted improvement or addition/modification rather than rectification. *In short, the complainant cannot 'throw the whole kitchen sink' of alleged unprocessed defects and expenses to the court to have them sorted out as presented by the defendant here.* (Emphasis added.)

**[143]** The aforesaid is quite apart from the fact that the plaintiff has not demonstrated that it had in fact made any payment of the invoices that were addressed to 'Two Offshore Marine Sdn Bhd'. Neither was there any person from Two Offshore Marine Sdn Bhd who had come to court to testify that the payments made were made on behalf of the plaintiff.

**[144]** In *Muhammed Shareef Mohamed Sagubar & 3 Ors v Malaysia Building Society Berhad* [2024] MLJU 784; [2024] CLJU 724, the court made it clear that payments made by another person will not suffice:

> It is clear that even if payment is made by another person, the claimant would not be able to claim for the loss as no actual loss has been suffered. Therefore, actual loss by the defendant must be proven by showing proof of payments together with receipts. In this case, no proof of actual loss was tendered by the defendant.

**[145]** It behoves counsel for the plaintiff to put before this court the requisite quality of evidence necessary to establish the plaintiff's claims for damages. The Court of Appeal in *Tenaga Nasional Bhd v Big Man Management Sdn Bhd* [2024] 2 MLJ 652; [2024 2 CLJ 775 makes the aforesaid clear in the following passages of the judgment:

> [96] The following cases illustrate the point as to the quality of evidence necessary to justify a claim for special damages. In particular the cases emphasize that there must be evidence of credible paper trail to show that payment was made. Indeed, invoice/vouchers per se without receipts, will not suffice. The first case is the Court of Appeal's decision in *Tan Ah Kow & Anor v Tan Chaui En* [2017] 6 MLJ 297; [2018] 2 CLJ 610 where the following principles were enunciated:
>
> > [24] The learned JC erred by not considering the fact that the bank statements exhibited by the respondent are actually not the bank statements of the respondent personally, but of the respondent's business, namely Lee Hin Motor Auto Parts Enterprise. Therefore, the bank statements do not reflect the respondent's personal bank transactions. Nowhere in the bank statements is it stated that the cheque payments by Lee Hin Motor Auto Parts Enterprise are paid to the first appellant for the respondent's purchase of the 13 pieces of land.
> >
> > [25] The respondent exhibited some invoices to prove his payments to the first appellant (exhs P2(a)-P31) for the purchase of the 13 pieces of land. The respondent contended that he had also paid the first appellant for the said purchase by way of contra with the sale of motorcycles by the respondent to the first appellant. *However, the learned JC failed to consider that the invoices by themselves do not prove payment of the purchase price to the first appellant. In commercial transactions, invoices are billing documents, but they are not receipts and thus cannot be used as proof of payment.* (Emphasis added.)

**[146]** However, although the plaintiff has failed to proof its claims for damages, the defendant vide their witnesses conceded that damage had been sustained by the barge resulting from the accident. In this regard, whilst DW1 had conceded to a sum of RM46,238.55 as the damages attributable to the accident, DW2 had in his testimony given an estimate of RM50,000 as damages.

**[147]** Thus, given the concession made by the defendant through its witnesses, this court will make an order for the defendant to pay the plaintiff the sum of RM50,000 as damages.

*Costs — The Calderbank offer*

**[148]** In a typical case, the party who prevails at the end of the trial should be awarded costs. However, the award of costs is a matter of discretion of the court.

**[149]** In the exercise of its discretion, O 59 r 8 of the Rules of Court 2012 provides thus:

> 8 Special matters to be taken into account in exercising discretion (O 59 r 8)
>
> The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account —
>
> (a) any offer of contribution or offer of settlement under Order 22B;
>
> (b) the conduct of all the parties, including conduct before and during the proceedings;
>
> (c) the conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution; and
>
> (d) in particular, the extent to which the parties have followed any relevant pre-action protocol or practice direction for the time being issued by the Registrar.

**[150]** In the present case, prior to the commencement of the action, the defendant through its solicitors had on 27 January 2023 made a Calderbank offer to settle to the plaintiff. This was prior to the plaintiff filing its statement of claim but after the writ had been filed.

**[151]** A Calderbank offer is essentially a written offer made on a without prejudice basis. It is made expressly reserving the right to bring the offer to the notice of the court on the question of costs if the result for the party served with the offer at the end of the trial is not more favourable than what has been offered in which event they may be penalised on costs. Calderbank offers are a strategic tool which can encourage settlement and discourage unnecessary litigation. The Calderbank offer principle originates from the landmark case of *Calderbank v Calderbank* [1975] 3 All ER 333 (EWCA).

**[152]** In the present case, the defendant had made repeated offers to settle:

(a) prior to commencement of trial, at RM150,000;

(b) after the close of the plaintiff's case, at RM150,000; and

(c) following the plaintiff's rejection of the defendant's offer of RM150,000, the defendant thereafter made an offer of RM80,000. This was made after the first tranche of the trial and before the commencement of the second tranche of trial.

**[153]** Based on the aforesaid, learned counsel for the defendant submitted that the court should take into account the following in assessing costs:

(a) the initial Calderbank offer made at literally the very outset of this case, at RM150,000;

(b) the settlement offer at RM150,000 made after expert evidence was provided to the plaintiff setting out why their claim on quantum could not succeed;

(c) the settlement offer at RM150,000 made after the close of the plaintiff's case, urging settlement when it was evident that the plaintiff could not prove its quantum; and

(d) the fact that the plaintiff sought to recall DW1 on the last day of trial, and then — after the defendant had incurred expenses securing his attendance at court — choosing not to cross-examine him.

**[154]** In short, the defendant had made multiple offers to settle on very generous terms but the plaintiff hah spurned all those offers. Instead, the plaintiff had opted for the defendant to be dragged through litigation which could have been resolved at the earliest opportunity, to the plaintiff's advantage, perhaps with the hope of obtaining a higher amount.

**[155]** As it has now turned out, the entire trial in this case could have been avoided if the plaintiff had accepted the defendant's Calderbank offer. This was at the expense of the defendant who had offered a more than a reasonable sum to meet the plaintiff's claims. The defendant had to incur legal costs and expenditure in appointing an expert to attend at the trial to testify on its behalf. This was exacerbated by the plaintiff's application to recall the defendant expert witness only to subsequently inform the court at the trial after the defendant had secured his attendance that it had no question to ask him.

**[156]** In the circumstances, it is my judgment that costs in this case ought to be visited on the plaintiff notwithstanding that the plaintiff has succeeded on the question of liability. This is because, to my mind, a defendant who had made a Calderbank offer which had been rejected by the plaintiff and the defendant is then made to incur legal expenses to defend the claims and is subsequently vindicated by the court that the offer made earlier to settle the plaintiff's claim was reasonable, ought to be treated as the 'successful party' to the litigation.

**[157]** In *Donald Campbell & Co Ltd v Pollak* [1927] All ER Rep 1, Lord Denning justified the 'hardship' on the plaintiff where costs is ordered against him in this manner:

> The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. *The public good is better secured by allowing plaintiffs to go on to trial at their own risk generally as to costs*. That is the basis of the rules as to payment into court, and I think we should implement them here, even though it means that the plaintiff has to pay

A out much of her damages in costs to the defendants. The only issue in the case was the amount of damages. *The defendants paid a reasonable sum into court. The plaintiff took her chance of getting more, and, having failed, she must pay the costs*. It must not be assumed, however, that, in allowing the appeal, this court is laying down a rule of law as to how a judge should exercise his discretion. We have no right to do that. It only means that in the present case, where the judge invited reconsideration of his decision, we think that, having regard to the rules as to payment into court, the plaintiff should be ordered to pay the costs from the date of payment in.

**[158]** Although Lord Denning's comments above were in respect of payment into court, a 'Calderbank offer' is for all intents and purposes akin to the same.

**[159]** Accordingly, it is the judgment of this court that the plaintiff is to pay the defendant costs fixed at RM80,000 subject to allocator and that the plaintiff is also to reimburse the defendant the sum of Singapore dollars $70,947.57 being the amount that the defendant had paid to engage DW1 as its expert witness for the trial.

CONCLUSIONS

**[160]** In the premises, this court hereby makes the following orders:

(a) the defendant to pay the plaintiff the sum of RM50,000 as damages with interest at the rate of 5%pa from the date of this judgment to the date of full realisation;

(b) the plaintiff to pay the defendant costs fixed at RM80,000 subject to allocator; and

(c) the plaintiff to reimburse the defendant the sum of S$ 70,947.57.

*Order accordingly.*

Reported by Nabilah Syahida Abdullah Salleh